> (5) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability only where each of the following conditions are satisfied.
>
> > (i) The incumbent LEC has deployed digital loop carrier systems [DLC], including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);
> >
> > (ii) There are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer;
> >
> > (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by paragraph (b) of this section; and
> >
> > (iv) The incumbent LEC has deployed packet switching capability for its own use.

BellSouth witness Ruscilli argues that BellSouth should not be required to unbundle its packet switching functionality except when these specific conditions are met. He contends that the FCC "clearly stated that an incumbent has no obligation to unbundle packet switching functionality 'if it permits a requesting carrier to collocate its DSLAM in the incumbent's remote terminal, on the same terms and conditions that apply to its own DSLAM'." (emphasis added by witness) *UNE Remand Order* at ¶313. Witness Ruscilli states that BellSouth will permit FDN to collocate its own DSLAM at a BellSouth RT, and if BellSouth is unable to accommodate such a collocation it will then unbundle packet switching functionality at that RT.

FDN witness Gallagher acknowledges that the FCC has established a four-part test, but states that this is merely "one set of circumstances where packet switching clearly must be unbundled." (emphasis added) He asserts that nothing in the *UNE Remand Order* suggests that packet switching may not be unbundled in other situations. Nevertheless, witness Gallagher contends, all four of these conditions are met in BellSouth's network. In particular, witness Gallagher disagrees that ALECs are afforded the ability to collocate DSLAMs at RTs on the same terms and conditions as BellSouth's DSLAMs. He argues that although BellSouth "nominally allows" ALECs to collocate DSLAMs in RTs, such collocation is subject to untenable terms and conditions. Witness Gallagher contends that BellSouth refuses to allow ALECs to connect DSLAMs to lit fiber that is used to carry BellSouth's traffic to the central office. He argues that since dark fiber is often not available, FDN's DSLAM would be stranded at the RT. For these reasons, witness Gallagher claims that BellSouth does not permit collocation of DSLAMs at RTs on the same terms and conditions applicable to BellSouth's DSLAM functionality.

Witness Gallagher suggests that we are not required to apply the four-part *UNE Remand Order* test before establishing a broadband UNE. Witness Gallagher contends that "the Florida Commission can and should order unbundling of packet switching if it finds that [ALECs] would be impaired without such access, pursuant to the terms of FCC Rule 51.317." (emphasis added)

Witness Ruscilli acknowledges that we have been granted the authority to establish additional UNEs, but, he argues that we "may establish a new UNE only if the carrier seeking the new UNE carries the burden of proving the impairment test set forth in the FCC's *UNE Remand Order*." FDN witness Gallagher agrees, stating that the legal standard to be used by us when creating a new UNE is prescribed in FCC Rule 51.317. We note that the standard set forth in the *UNE Remand Order*, as referred to by BellSouth witness Ruscilli, and that set forth in FCC Rule 51.317 are one and the same. The rule states that if the state commission "determines that lack of access to an element impairs a requesting carrier's ability to provide service, it may require the unbundling of that element. . . ." 47 C.F.R. §51.317(b)(1).

In considering whether lack of access to a network element "materially diminishes" a requesting carrier's ability to provide service, state commissions are to consider whether alternatives in the market are available as a practical, economic, and operational

matter. In doing so, the state commissions are to rely on factors such as cost, timeliness, quality, ubiquity, and impact on network operations to determine whether alternative network elements are available. 47 C.F.R. §51.317(b)(2)) State commissions may also consider additional factors such as whether unbundling of a network element promotes the rapid introduction of competition; facilities-based competition, investment and innovation; and reduced regulation. Further, the state commission may consider whether unbundling the network element will provide certainty to requesting carriers regarding the availability of the element, and whether it is administratively practical to apply. 47 C.F.R. §51.317(b)(3)

FDN witness Gallagher argues that the "cost of providing ubiquitous service throughout the state of Florida by collocating DSLAMs at remote terminals would be staggeringly expensive, and well beyond the capability of FDN or other [ALECs]." He states that FDN has spent millions of dollars to collocate equipment in 100 of BellSouth's 196 central offices in Florida. With over 12,000 remote terminals in BellSouth's network, witness Gallagher contends that collocation on that scale would be financially impossible for FDN. BellSouth witness Williams confirms that as of May 23, 2001, there were 12,037 remote terminals in BellSouth's Florida network. Witness Gallagher also contends that it would be prohibitively time-consuming to collocate a DSLAM in every remote terminal(RT). He states that "the process in my estimation would require well more than one year before FDN could start to provide service, and perhaps much longer."

Another alternative proposed by BellSouth for providing DSL service to consumers served by a DLC loop is utilizing an available "home run" copper loop. Witness Williams explains that FDN could perform an electronic Loop Make-Up and locate an available home-run copper loop from the customer's NID all the way to FDN's central office collocation space. FDN would then reserve this loop and place an order for that home-run copper loop. BellSouth would then do a loop change to move FDN to an all-copper loop.

FDN witness Gallagher responds that in many BellSouth service areas, no copper facilities are available for DSL. In addition, he states that many DLCs are deployed where copper loops are longer than 18,000 feet. At that distance they are not capable of carrying DSL transmission. He contends that "[e]ven where home run copper loops are DSL-capable, the quality of the DSL transmissions would be inferior to DLC loops and therefore would not be competitive in the consumer market."

BellSouth witness Ruscilli contends that FDN is not impaired by the fact that BellSouth does not provide packet switching functionality or the DSLAM as a UNE because FDN can purchase, install, and utilize these elements just as easily and cost-effectively as BellSouth. In addition, witness Ruscilli argues that in determining whether to create a new broadband UNE, we must consider the effects unbundling will have on investment and innovation in advanced services. He states that an important part of the FCC's reasoning in not unbundling advanced services equipment was to avoid stifling competition and to encourage innovation. He argues that ALECs can choose to install ATM switches and DSLAMs just as BellSouth has done, and they would not be impaired by implementing this strategy.

Furthermore, witness Ruscilli contends that requiring the unbundling of advanced services equipment would have a "chilling effect" on BellSouth's incentives to invest in such equipment. He states that just as ALECs would have no incentive to invest in advanced services equipment, an ILEC's incentive to invest in such equipment would be stifled if its competitors can take advantage of the equipment's use without incurring any of the risk. We agree.

We do not believe that a general unbundling requirement for all of BellSouth's network based upon the four-part test contained in Rule 51.319 is appropriate. Rather, this rule contemplates a case-by-case analysis of whether these conditions are met at specific remote terminals. We agree with BellSouth witness Ruscilli, who states that "[r]equiring the statewide unbundling of packet switching if an ALEC can find one remote terminal to which this exception applies would impermissibly ignore the FCC's intent by allowing the limited exception to swallow the general rule."

There is insufficient evidence in the record to make a determination regarding each of the specific remote terminals deployed in BellSouth's network, but the testimony does show that BellSouth does allow for the collocation of DSLAMs in remote terminals. Thus, we do not believe the four-part test contained in Rule 51.319 has been met. Therefore, the record does not support unbundling packet switching pursuant to Rule 51.319. We further note that while there is no evidence in the record to support a finding that FDN can obtain the ability to provide the desired functionalities through third parties, there was evidence regarding several proposed alternative methods of providing DSL to consumers served by DLC loops when an ALEC is the voice provider.

FDN witness Gallagher contends that "early entry and early name recognition are crucial to success in markets for new technologies and new services." He states that with each day FDN falls further behind BellSouth in the DSL market. While certain advantages accrue to the provider who is first to market, the record nevertheless reflects that the initial cost of installing a DSLAM in a remote terminal is similar for FDN and BellSouth.

The FCC explains that two fundamental goals of the Act are to open the local exchange and exchange access markets to competition, and to promote innovation and investment by all participants in the telecommunications marketplace. *UNE Remand Order* at ¶103. BellSouth witness Ruscilli contends that the FCC has acknowledged that there is "burgeoning competition" to provide advanced services, and that this exists without unbundling ILEC advanced services equipment. He asserts that the "existence of this competition alone precludes a finding of impairment." In support of his position, witness Ruscilli cites to paragraph 316 of the *UNE Remand Order* in which the FCC explained that it declined to unbundle packet switching due to its concern that it "not stifle burgeoning competition in the advanced service market." BellSouth argues that creating a broadband UNE would "have a chilling effect on BellSouth's incentives to invest in the technologies upon which advanced services depend." BellSouth contends that "an ILEC's incentive to invest in new and innovative equipment will be stifled if its competitors, who can just as easily invest in the equipment, can take advantage of the equipment's use without incurring any of the risk."

We share the concern that, in the nascent xDSL market, unbundling could have a detrimental impact on facilities-based investment and innovation. While unbundling DSLAMs at remote terminals could indirectly promote competition in the local exchange market, this might discourage facilities-based competition and innovation. Such an unbundling requirement may impede innovation and deployment of new technologies, not only for ILECs, but for the competitors as well. Thus, we believe it is prudent to carefully weigh the potential effect of unbundling a broadband UNE, and we also believe that the effects of the creation of a broadband UNE have not been adequately explored in this proceeding.

Upon consideration of the evidence and arguments presented, we find BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling. We have serious concerns that requiring BellSouth to

unbundle its DSLAMs in remote terminals would have a chilling effect on broadband deployment. Furthermore, we do not believe that FDN has demonstrated that it would be impaired without access to a broadband UNE, because it does have the ability to collocate DSLAMs. While FDN has raised the expense of such collocation as a concern, the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN. As such, FDN has not demonstrated that it is any more burdensome for FDN to collocate DSLAMs in BellSouth's remote terminals than it is for BellSouth. Since the record does not reflect that FDN faces a greater burden than does BellSouth, we do not find that FDN is impaired in this regard. For these reasons, we find it is not appropriate at this time to require BellSouth to create a broadband UNE.

We emphasize that the best remedy in this situation would have been a business solution whereby the parties would negotiate the terms of the provision of the DSL service, instead of a regulatory solution. By not requiring a broadband UNE, the possibility of a business solution still exists.

Conclusion

Accordingly, we decline to require BellSouth to create a broadband UNE at this time for the purposes of the new FDN/BellSouth interconnection agreement.

V. RESALE

The final issue before us is whether BellSouth should be required to offer its DSL service at resale discounts. FDN witness Gallagher contends that "BellSouth and its affiliates are required to offer, on a discounted wholesale basis, all of their retail telecommunications services, including xDSL and other high-speed data services, pursuant to the resale obligations applicable to incumbent local exchange carriers under Section 251(c)(4) of the Federal Act." He states that while not a substitute for UNE access, the Act does require BellSouth to offer access to these services through resale.

Section 251(c)(4)(A) of the Act states that ILECs have "the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." BellSouth witness Ruscilli argues that BellSouth is not obligated to make its Internet access offering available at the resale discount because it is an

enhanced, nonregulated, nontelecommunications service. He explains:

> If BellSouth markets DSL to residential and business end users, then the service is clearly a retail offering, and the wholesale discount applies. However, if the DSL service is offered to Internet Service Providers as an input component to the ISP service offering, it is not a retail offering, and the resale requirements of the Act do not apply. BellSouth's Fast Access Internet service falls into the latter category. Fast Access is not a telecommunication service. It is an enhanced, nonregulated, nontelecommunication Internet access service that uses BellSouth's wholesale DSL telecommunication service as one of its components.

Witness Ruscilli contends that BellSouth does not offer a tariffed retail DSL service, and has no obligation to make available its wholesale DSL service at the resale discount. In support of his position, witness Ruscilli cites the FCC's *Second Advanced Services Order* in CC Docket No. 98-147[5]. The *Second Advanced Services Order* states:

> Based on the record before us and the fact specific evaluation set out above, we conclude that while an incumbent LEC DSL offering to residential and business end-users is clearly a retail offering designed for and sold to the ultimate end-user, an incumbent LEC offering of DSL services to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering. Accordingly, we find that DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4). We conclude, however, that section 251(c)(4) does not apply where the incumbent LEC offers DSL services as an input component to Internet Service Providers who combine the DSL service with their own Internet service. (footnote omitted)

[5] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, Order No. FCC 99-330; 14 FCC Rcd 19237 (1999).

Order at ¶19. Witness Ruscilli states that the United States Court of Appeals for the District of Columbia Circuit recently issued a decision that confirms the FCC's ruling.[6] In its decision, the court considered ASCENT's objections to the above mentioned language, and found that the FCC's Order was in all respects reasonable.

FDN responds that to qualify for this exclusion, ILEC offerings must be exclusively wholesale offerings. FDN contends that BellSouth's offering is not so narrowly tailored, and thus is not exempt from resale obligations. FDN witness Gallagher contends that BellSouth does sell retail DSL through an ISP that it owns and controls. He maintains that "the BellSouth group of companies, taken together, is the largest retail DSL provider in Florida." He explains:

> BellSouth's ISP obtains DSL from BellSouth's local exchange company. BellSouth promotes and sells its telephony and DSL service using the same advertisements, customer service and sales agents, and Internet sites, including [BellSouth Telecommunications' website]. Revenues from DSL sales and telecommunications services are reported together and accrue for the benefit of the same BellSouth shareholders. If BellSouth were permitted to avoid its Section 251 obligations by selling all of its telecommunications service on a wholesale basis to other affiliates, it would render the unbundling and resale obligations of the Federal Act meaningless. Therefore, retail sales of telecommunications services by any BellSouth affiliate should be attributed to the local exchange carrier operation for the purposes of Section 251.

[6] Association of Communications Enterprises v. FCC, 253 F.3d 29 (D.C. Cir. 2001). ("ASCENT II")

In support of this position, witness Gallagher cites a January 9, 2001, decision by the Unites States Court of Appeals for the District of Columbia Circuit (*ASCENT*)[7], in which he states that the court held that ILECs may not "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate." According to witness Gallagher, the court held that retail sales of telecommunications services by ILEC affiliates are still subject to the ILEC's resale obligations. He explains that although the court's decision in *ASCENT* involved a regulation pertaining to SBC specifically, the logic of the decision should apply to BellSouth as well.

BellSouth witness Ruscilli contends that the *ASCENT* decision does not support FDN's position in this issue. He argues that the *ASCENT* decision deals with regulatory relief granted by the FCC in the Ameritech/SBC merger, regarding the resale of advanced services if offered through a separate affiliate. He states that this ruling does not require BellSouth to offer advanced services at resale. In addition, witness Ruscilli argues that BellSouth does not have a separate affiliate for the sale of advanced services. In its brief, BellSouth explains that BellSouth's FastAccess Internet Service is sold by BellSouth Telecommunications, Inc. as a non-regulated Internet access service offering, that utilizes BellSouth's wholesale DSL service as a component.

[7] Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C. Cir. 2001) ("*ASCENT*")

FDN witness Gallagher argues that "BellSouth cannot refuse to separate its [DSL] telecommunications service from its enhanced services for the purpose of denying resale." He contends that "FCC unbundling rules require BellSouth to offer its telecommunications services separately from any enhanced services, even if it only sells them as a bundled product." In its brief, FDN refers to FCC Memorandum Opinion and Order in CC Docket No. 98-79,[8] stating that the "FCC has expressly held that DSL transmission is an interstate telecommunications service that does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II." FDN also cites the recent D.C. Circuit Court's *WorldCom* decision,[9] to argue that as long as a carrier "qualifies as a LEC by providing either 'telephone exchange service' or 'exchange access,' then it must resell and unbundle all of its telecommunications offerings, including DSL." FDN witness Gallagher states that FDN does not seek to resell BellSouth's Fast Access Internet service, but rather only the DSL telecommunications transport component of that service.

Section 251(c)(4)(A) of the Act states that ILECs have the duty to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." When determining if a particular service is subject to the resale obligations of the Act, we must consider primarily two things: (1) whether the service is a telecommunications service, and (2) whether the service is offered at retail.

BellSouth contends that its FastAccess Internet Service is an "enhanced, nonregulated, nontelecommunication Internet access service" and exempt from the Act's resale provisions. We agree. While BellSouth does in fact sell this service on a retail basis, we believe that BellSouth's FastAccess Internet Service is an

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[8] GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, Memorandum Opinion and Order, Order No. FCC 98-292; 13 FCC Rcd 22466 (1998).

[9] WorldCom, Inc. v. FCC, 246 F.3d 690 (D.C. Cir. 2001).

enhanced, information service that is not subject to the resale requirements contained in Section 251 of the Act.

However, FDN does not request that we require BellSouth to offer its FastAccess Internet Service at the resale discount; rather, FDN seeks to resell only the DSL component of that service. In its brief FDN argues that BellSouth has provided no legal basis for its claim that "bundled," "enhanced" services are exempt from the resale obligation. FDN contends this is because there is no legal basis for BellSouth's claim. On the contrary, FDN asserts that "[f]or the last 20 years, FCC bundling rules have required facilities-based common carriers to offer telecommunications services separately from any enhanced services, even if it only offers them at retail as a bundled product." (footnote omitted)

We agree that the FCC has long required ILECs offering enhanced services to offer the basic service components to other carriers on an unbundled basis; however, we do not believe this requirement reaches the level of unbundling that FDN seeks. In its Third Computer Inquiry (*Computer III*)[10], the FCC stated:

> [W]e maintain the existing basic and enhanced service categories and impose CEI and Open Network Architecture requirements as the principal conditions on the provision of unseparated enhanced services by AT&T and the BOCs. The CEI standards, which will be in effect on an interim basis pending our approval of a carrier's Open Network Architecture Plan, require a carrier's enhanced services operations to take under tariff the basic services it uses in offering unseparated enhanced services. Such basic services must be available to other enhanced services providers and users under the same tariffs on an unbundled and functionally equal basis.

Computer III at ¶ 4. Further, the FCC stated:

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[10] In the Matters of: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services an Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, 104 FCC 2d 958 (1986)

> [W]e consider Open Network Architecture to be the overall design of a carrier's basic network facilities and services to permit all users of the basic network, including the enhanced service operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and "equal access" basis. A carrier providing enhanced services through Open Network Architecture must unbundle key components of its basic services and offer them to the public under tariff, regardless of whether its enhanced services utilize the unbundled components.

Computer III at ¶113.

We believe the record shows that BellSouth complies with these obligations when providing its own FastAccess Internet Service. In its brief, BellSouth explains that its "FastAccess Internet Service is a combination of a federally-tariffed wholesale DSL service and e-mail, Internet, and other enhanced services (which were analogized to the water that flows through the DSL pipe during the hearings)." While BellSouth offers its DSL service to ISPs at the tariffed wholesale rate, witness Ruscilli argues that BellSouth does not offer a tariffed retail DSL service.

We believe that BellSouth offers its DSL service as a wholesale tariffed product available to other enhanced service providers pursuant to the unbundling requirements of *Computer III*. As a wholesale product that is only offered to enhanced service providers, we do not believe BellSouth's DSL service is subject to the resale obligations contained in Section 251(c)(4). As stated by the FCC in its *Second Advanced Services Order*, "an incumbent LEC offering of DSL services to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering." Order at ¶19. We note that the *Second Advanced Services Order* was recently affirmed by the D.C. Circuit Court of Appeals in *ASCENT II*. However, in the *ASCENT II* decision the Court stated that

> If in the future an ILEC's offering designed for and sold to ISPs is shown actually to be taken by end-users to a substantial degree, then the Commission might need to modify its regulation to bring its treatment of that offering into alignment with its interpretation of "at retail," but that is a case for another day.

ASCENT II at p.32.

Although there has been some discussion regarding the first *ASCENT* decision by the D.C. Circuit Court of Appeals, we do not believe this decision has any impact on the issue presently before us. FDN witness Gallagher contends that in *ASCENT*, the D.C. Circuit Court found ILECs may not "sideslip §251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate." We agree that the D.C. Circuit Court found that Section 251 resale requirements extend to ILEC affiliates; however, BellSouth does not offer its DSL service through a separate affiliate. Even if BellSouth was to offer this service through a separate affiliate, the DSL service in question is a wholesale product that would still not be subject to the resale obligations contained in Section 251.

Conclusion

We find that BellSouth's DSL service is a federally tariffed wholesale product that is not offered on a retail basis. Since it is not offered on a retail basis, BellSouth's DSL service is not subject to the resale obligations contained in Section 251(c)(4)(A). Therefore, we find that BellSouth shall not be required to offer either its FastAccess Internet Service or its DSL service to FDN for resale in the new BellSouth/FDN interconnection agreement.

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decisions are consistent with the terms of Section 251, the provisions of the FCC rules, applicable court orders and provisions of Chapter 364, Florida Statutes.

The parties shall be required to submit a signed agreement that complies with our decisions in this docket for approval within 30 days of issuance of this Order. This docket shall remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that the parties shall submit a signed agreement that complies with our decisions in this docket for approval within 30 days of issuance of this Order. It is further

ORDERED that this docket shall remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 5th day of June, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: /s/ Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

This is a facsimile copy. Go to the Commission's Web site, http://www.floridapsc.com or fax a request to 1-850-413-7118, for a copy of the order with signature.

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT "2"

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-02-1453-FOF-TP ISSUED: October 21, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
MICHAEL A. PALECKI

ORDER DENYING MOTIONS FOR RECONSIDERATION, CROSS-MOTION FOR RECONSIDERATION AND MOTION TO STRIKE

BY THE COMMISSION:

CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August

15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. BellSouth filed a Motion to Strike Cross-motion for Reconsideration, or in the Alternative, Response to FDN's Cross-motion on July 5, 2002.

We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3,2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.

This Order addresses FDN's and BellSouth's Motions for Reconsideration, as well as the Cross-Motion for Reconsideration and Motion to Strike.

JURISDICTION

We have jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252 (e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we should utilize discretion in the exercise of such authority. In addition, Section

120.80(13)(d), Florida Statutes, authorizes us to employ procedures necessary to implement the Act.

We retain jurisdiction of our post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code.

FDN'S MOTION FOR RECONSIDERATION

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

We believe that FDN has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, we believe that FDN's Motion should be denied.

FDN contends that the Order does not appear to explicitly address FDN's entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation. FDN states that the anticompetitive effects of BellSouth's alleged tying practice are the same whether the customer is presently a BellSouth customer, whom FDN cannot capture, or is presently a FDN customer, whom FDN will lose because of BellSouth's anticompetitive practice. FDN states that the Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, FDN argues that the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain voice and DSL-based services from the provider(s) of their choice

unless the consumers exercised rights at just one specific point in time, prior to porting to an ALEC voice provider. Consequently, FDN suggests that the Commission meant to adopt an across-the-board rule requiring BellSouth to provide FastAccess service to all qualified customers served by ALECs over BellSouth loops.

BellSouth responds that the Order states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." Order at 11. BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Rather, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. We agree.

Although FDN argues that we overlooked a material aspect of the anticompetitive allegation, it fails to demonstrate that a point of fact or law has been overlooked. In our decision, we determined in part that BellSouth's practice of disconnecting its FastAccess Service unreasonably penalizes customers who desire to have access to voice service from FDN and DSL from BellSouth. Order at 11. Further, we determined that this practice creates a barrier to competition in the local telecommunications market. Id. Consequently, we found that BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

We believe that we were clear in our decision requiring BellSouth to continue to provide FastAccess Service to those BellSouth customers who choose to switch their voice provider. Id. The Order clearly demonstrates that we considered the arguments raised by FDN. Thus, FDN's Motion is mere reargument, which is inappropriate for a motion for reconsideration. Thus, FDN's motion is denied.

BELLSOUTH'S MOTION FOR RECONSIDERATION

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.

2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). We have applied this same standard in addressing BellSouth's motion.

We believe that BellSouth has failed to demonstrate that we made a mistake of fact or law in rendering our decision. Therefore, we deny BellSouth's Motion for reconsideration regarding this issue.

In its Motion, BellSouth states that we have improperly converted an arbitration under the Act into a state law complaint case. BellSouth argues that its FastAccess Internet Service is a nonregulated nontelecommuications DSL-based service. Thus, BellSouth concludes that it is not a service over which this Commission has jurisdiction. FDN responds that nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252 of the Act. We agree. Section 251(d)(3) of the Act provides that the FCC shall not preclude:

> the enforcement of any regulation, order, or policy of a state commission that:
>
> > (A) establishes access and interconnection obligations of local carriers;
> > (B) is consistent with the requirements of this Section [251];
> > (C) does not substantially prevent implementation of requirements of this section and the purposes of this part.

Order at 10. Further, we believe that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission's purpose in promoting competition is to ensure "the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Order at 9.

BellSouth contends that the FCC determined that BellSouth's practice of not providing its federally-tariffed, wholesale ADSL telecommunications service on UNE loops is not discriminatory and therefore does not violate Section 202(a) of the Act. BellSouth states that the purpose of Section 706 of the Act is to encourage

the deployment of advanced services and that the Commission's decision does not seek to promote advanced services but to promote competition in the voice market. FDN responds that while it is true that one of the factors which prompted the Commission's decision was to promote competition in the local voice market, the Commission's Order supports deployment and adoption of advanced services as promoted by Section 706 of the Act, by removing significant barriers that limit consumer choice in the local voice market. We agree. As stated in the Order, we determined that Congress has clearly directed state commissions, as well as the FCC, to encourage deployment of advanced telecommunications capability by using, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure." Order at 9.

BellSouth maintains that it is efficient for BellSouth to provide its FastAccess DSL service when it is providing the basic telephone service. FDN responds that if a customer cannot obtain cable modem service and BellSouth is the sole provider of DSL, BellSouth is put in a position of competitive advantage over ALECs. As stated in our Order, the Florida statutes provide that we must encourage competition in the local exchange market. Specifically, as set forth in Section 364.01(4)(g), Florida Statutes, the Commission shall "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . . " Order at 9. As addressed in the Order, we found that BellSouth's practice of disconnecting its FastAccess service when a customer changes to another voice provider is a barrier to entry into the local exchange market. Order at 4,8.

Furthermore, although BellSouth indicates that the D.C. Circuit Court of Appeals vacated the FCC's *Line Sharing Order* because the FCC failed to consider the competition in the market for DSL service, we do not believe that the same rationale in that decision is applicable here because that decision did not address competitive issues arising under state law in which a specific finding was made that the disconnection of the service was a barrier to local competition. Thus, we do not believe BellSouth has identified a mistake of fact or law by the Commission's lack of reliance on that decision.

BellSouth also requests that the Commission clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over a new loop that it installs to serve the end user's premises. FDN responds that BellSouth's provisioning proposal would be harmful and undermine the Commission's intent. Further, FDN asserts that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant. Although the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service to FDN was not addressed in the Commission's Order, we believe that FDN's position is in line with the tenor of our decision. While the Order is silent on provisioning, we believe our decision envisioned that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers.

We indicated in our Order that our finding regarding FastAccess Internet Service should not be construed as an attempt to exercise jurisdiction over DSL service but as an exercise to promote competition in the local voice market. Order at 11. To the extent that BellSouth has requested that our decision be clarified in regards to the provisioning of its FastAccess Internet Service, we observe that the provisioning of BellSouth's FastAccess Internet Service was not specifically addressed by our decision. However, we contemplated that BellSouth would provide its FastAccess Internet Service in a manner so that the customer's service would not be altered. We note however, that there may be momentary disruptions in service when a customer changes to FDN's voice service. While we decline to impose how the FastAccess should be provisioned, we believe that the provision of the FastAccess should not impose an additional charge to the customer.

BellSouth asserts that for it to provision its FastAccess Internet Service over a UNE loop would be a violation of its FCC tariff. Although we acknowledge BellSouth's FCC tariff, we believe that we are not solely constrained by an FCC tariff. As indicated in our order, under Section 251(d) of the Act, we can impose additional requirements as long as they are not inconsistent with FCC rules, or Orders, or Federal statutes. We believe that BellSouth has failed to make a showing that our decision is contrary to any controlling law. Further, at the hearing, BellSouth's witness Williams testified that although it would be

costly, it would be feasible to track UNE loops. To the extent that these technical limitations can be overcome, we infer that it would be technically feasible to provision FastAccess on an FDN UNE loop.

In summary, although BellSouth has asserted that we overlooked a number of material facts, BellSouth has not identified a point of fact or law which was overlooked or which the we failed to consider in rendering our decision. Therefore, the motion for reconsideration shall be denied. However, we envisioned that BellSouth's migration of its FastAccess Internet Service to an FDN customer would be seamless. Consequently, we clarify that BellSouth's migration of its FastAccess Internet Service to an FDN customer shall be a seamless transition for a customer changing voice service from BellSouth to FDN in a manner that does not create an additional barrier to entry into the local voice market.

BELLSOUTH'S MOTION TO STRIKE

In its Motion, BellSouth seeks to strike FDN's Cross-Motion for Reconsideration because it believes it is an untimely motion for reconsideration. Rule 25-22.060(1)(b), Florida Administrative Code, provides for cross-motions for reconsideration. While Rule 25-22.060(1)(a), Florida Administrative Code, does limit certain types of motions for reconsideration, the limitation urged by BellSouth is not one of them.[1] Nor could it be reasonably implied, because the limitations enumerated in the rule restrict reconsideration of orders whose remedies have been exhausted or orders that are not ripe for review. More importantly, we have held that "[o]ur rules specifically provide for Cross-Motions for Reconsideration and the rules do not limit either the content or the subject matter of the cross motion." Order No. 15199, issued October 7, 1985, in Dockets Nos. 830489-TI and 830537-TL. Based on the foregoing, we find that BellSouth's Motion to Strike is denied.

[1]Rule 25-22.060(1)(a), Florida Administrative Code, prohibits motions for reconsideration of orders disposing of a motion for reconsideration and motions for reconsideration of PAA Orders.

FDN'S CROSS-MOTION FOR RECONSIDERATION

FDN believes that it faces a greater burden than BellSouth in the self-provisioning of DSL loops, because it faces higher costs, does not have the same access to capital, and would be unlikely to obtain transport back to the central office. FDN asserts that BellSouth has an advantage because it buys DSLAMs in bulk. However, witness Gallagher only testifies that when "you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly cheap." FDN presented no evidence that BellSouth purchases DSLAMs in bulk or that BellSouth receives a discount on its purchase of DSLAMs. In fact late-filed Exhibits 12 and 13 indicate that the purchase prices for FDN and BellSouth are relatively the same.[2]

FDN also contends that the Commission overlooked evidence that even if the cost for DSLAMs were the same, FDN is impaired because as a smaller company it does not have the same access to capital as BellSouth. However, the only testimony presented was witness Gallagher's assertion that he does not have the same captive market and that he could not raise the money to collocate FDN's own DSLAM because "[t]he rates of return aren't there."

BellSouth responds that there is no evidence that BellSouth buys DSLAMS in bulk, nor is there support that BellSouth receives a bulk discount on DSLAMs or line cards. BellSouth contends that FDN's assertion that the Commission overlooked the FCC's guidance to consider the economies of scale in performing an impairment analysis is not correct. BellSouth states that FDN has failed to meet the impair standard and that the evidence shows that BellSouth has not deployed line cards in Florida that are capable of providing the broadband service FDN seeks to provide.

We believe that FDN has failed to show any evidence that we overlooked or failed to consider. We considered the arguments presented by FDN and found that "BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling." Order at 17. In so doing, we

[2]BellSouth late-filed exhibit 12 shows that BellSouth can purchase an 8-port DSLAM for $6,095, while FDN late-filed exhibit 13 shows that FDN can obtain an 8-port DSLAM for $6,900.

also found that "the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN." Id.

FDN also claims that we overlooked evidence that even if FDN were able to collocate a DSLAM it likely would not be able to obtain transport back to the central office. However, there was also evidence that BellSouth offers UNE subloops between the remote terminal and the central office, and that BellSouth would sell these UNE subloops at the rates established by us. Upon consideration of this competing evidence, we found that "there was evidence regarding several proposed alternatives of providing DSL to consumers served by DLC loops when an ALEC is the voice provider." Order at 16.

Finally, FDN asserts that we did not address FDN's ability to collocate xDSL line cards when BellSouth begins to deploy NGDLC in Florida. There was testimony that approximately seven percent of BellSouth's access lines were served by NGDLCs, but there was also testimony that combo cards were not used for BellSouth's xDSL service.

We did not overlook or fail to consider this issue, because the issue was not before us. While FDN does argue that it has met part three of the impair standard, it concludes by stating that "[t]herefore, the FCC's four-part test is satisfied, and BellSouth must be ordered to offer unbundled packet switching where it has deployed DLCs." However, FDN fails to point out that an ILEC is only required to "unbundle[] packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal." UNE Remand Order ¶313. Even if the impair analysis could be read to apply in cases where BellSouth has deployed combo cards instead of DSLAMs, the unbundling requirement is only designed to remedy an immediate harm. The harm alleged by FDN is prospective because "none of those NGDLCs and none of those NGDLC systems are capable of using combo cards that would also support data." Based on the foregoing, we believe that FDN has failed to identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order.

The parties shall be required to file their final interconnection agreement within 30 days after the issuance of this